

**BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA**

In the Matter of the Petition for Reinstatement
of:

Case No.: A1 2001 319

DELENO N. DUNCAN, JR.

Funeral Director License No. FDR 1726
Apprentice Embalmer Registration No. AE
12130

Petitioner.

DECISION AFTER PETITION FOR REINSTATEMENT

This matter came before the Director of the Department of Consumer Affairs (Department) for the Cemetery and Funeral Bureau (Bureau) by submission of a Petition for Reinstatement, dated December 3, 2018, by Petitioner Deleno N. Duncan. Petitioner seeks to have his Funeral Director and Apprentice Embalmer Registration licenses reinstated by the Bureau. In accordance with Government Code section 11522, the parties were afforded an opportunity to submit written argument on or before February 22, 2019.

On February 8, 2019, written argument was filed by the Attorney General's Office. Petitioner did not submit written argument in support of his Petition for Reinstatement.

The Director, having reviewed and considered the parties' evidence and written argument, hereby denies the petition.

FACTUAL FINDINGS

License and Criminal History

1. On August 4, 1998, the Bureau issued Apprentice Embalmer Registration Number AE 12130 to the Petitioner. On July 22, 1999, the Bureau issued Funeral Director License Number FDR 1726 to the Petitioner.

2. On or about August 5, 2002, the Bureau filed Accusation No. A1-2001-319 (Accusation) against the Petitioner. The Accusation alleged that Petitioner was guilty of conduct constituting grounds for disciplinary action based on his convictions of the following crimes:

- a. On or about March 22, 2001, Petitioner was convicted of violating Penal Code section 288 (c)(1), lewd or lascivious act on a child fourteen or fifteen years, a felony, in Santa Clara County Superior Court Case No. CC198558. The factual circumstances underlying the conviction involved the Petitioner, over the course of approximately one year, showing a 15-year old child corpses and photographs of dead bodies, sending the child naked photographs of adult males, masturbating in the presence of the child while at Petitioner's place of employment, and initiating the child into a gang.¹
 - b. On or about September 11, 2001, Petitioner was convicted of violating Penal Code section 243.4 (d)(1), misdemeanor sexual battery, in Solano Superior Court Case No. VCR152490. Said sexual battery was committed in or around August or September 2000, on an 18-year old male whom Petitioner had previously taken to a cemetery on the day of the assault.
 - c. On or about July 15, 2002, Petitioner was convicted of violating Penal Code section 118, perjury, a felony, in Solano Superior Court Case No. VCR1611512. The factual circumstances underlying the conviction involved the Petitioner providing false information regarding his name and date of birth upon an application for a California driver's license with the Department of Motor Vehicles.
3. Based on these convictions, on February 27, 2003, Petitioner's Funeral Director and Apprentice Embalmer Registration licenses were ordered revoked, effective March 29, 2003, by then Chief Deputy Director of Consumer Affairs, Denise Brown.²
4. In addition, Petitioner was ordered to pay the Bureau its costs of investigation and enforcement in the amount of \$3,000. Petitioner has paid to the Bureau the full amount of cost recovery.

Petitions for Reinstatement

5a. On or about June 14, 2013, Petitioner submitted a letter to the Bureau requesting reinstatement of his Funeral Director's license. Petitioner subsequently provided his "formal," petition for reinstatement on August 2, 2014, by completing and submitting the Bureau's Application for Funeral Director Examination and License Fee which Petitioner identified as an "Application for Reinstatement."

5b. On August 19, 2013, Petitioner wrote a letter to then Bureau Chief, Lisa Moore in which he stated that he had made "mistakes," and that he had "messed up." Petitioner stated that he regrets the "bad choices," he had made in the past, but failed to specify which of his past acts he considers to have been mistakes.

¹ Said incidents occurred in 2000. Petitioner was twenty-six years of age and employed as an apprentice embalmer at Oak Hill Funeral Home in San Jose, CA.

² On or about October 29, 2002, Petitioner entered into a Stipulated Revocation of his Funeral Director and Apprentice Embalmer Registration licenses with the Bureau.

5c. On March 24, 2014, the Director denied the petition, finding in part that, "Petitioner had certainly shown some evidence of rehabilitation. He has not, however, provided any evidence that he has insight into whatever it was that motivated him in his misconduct."

6a. On or about March 24, 2015, Petitioner submitted his second request for reinstatement. Accompanying his petition were letters of support, Petitioner's criminal history information, expungement documentation, and a resume.³

6b. With his second petition, Petitioner reiterated his completion of mandatory sex offender therapy that he was ordered to participate in as a condition of his parole between March 2005 through March 2006. Further, Petitioner characterized his offenses as "experimental," because he wanted to know "what it would be like to be with the same sex," and proclaimed that "I no longer have the urge or desire to experiment."

6c. On July 29, 2015, the Director denied the petition. The Director's decision highlighted Petitioner's failure to provide sufficient evidence of rehabilitation and noted the following:

Petitioner has failed to demonstrate any rehabilitation since the time his prior Petition for Reinstatement was denied on March 24, 2014, until now. Moreover[,] his attempt to explain what he learned from his treatment program was dismal and evidences his misperception that the criminality in his acts, which was solely the victim's age, not the victim's gender. Petitioner has failed to demonstrate sufficient evidence of rehabilitation to support a finding that he has been sufficiently rehabilitated to warrant reinstatement.

7a. On September 16, 2016, Petitioner submitted his third request for reinstatement to the Bureau. Again, Petitioner submitted letters of support, a personal statement, and his criminal history and expungement documentation in support of his petition.

7b. In his third petition, Petitioner stated that he considers himself, "a low-risk for further offenses of this nature," and that he could assure the Department that he no longer has "those past desires or wish[es] for sexual experimentation which led to my original offense."

7c. On December 27, 2016, the Director denied Petitioner's third request for reinstatement. The Director's decision underscored that Petitioner, "only presented evidence to support conduct which he was mandated to do as a condition of [his] criminal probation." In addition, the decision concluded by finding that:

Petitioner's efforts and acts of rehabilitation must be demonstrated by proven action, not just his own claims of being "good." Petitioner's progress in rehabilitation is still insufficient to eliminate the risk to the public at this time.

³ On October 25, 2011, Petitioner's convictions in Case Nos. VCR152490 (sexual battery) and VCR161512 (perjury) were dismissed pursuant to Penal Code section 1203.4.

8. On December 3, 2018, Petitioner submitted a one-page petition for reinstatement to the Bureau. With his current petition, Petitioner makes no effort to address the specific issues raised in the Director's prior decisions denying his reinstatement. Additionally, despite being afforded the opportunity to submit written argument in support of his fourth petition, Petitioner declined to utilize this opportunity to do so and thus demonstrate any measures he has undertaken to further rehabilitate himself since his most recent denial in 2016.

9. On February 8, 2018, Deputy Attorney General (DAG), Jonathan D. Cooper timely submitted written argument with the Bureau. While DAG Cooper did not expressly oppose the Petitioner's request for reinstatement, his analysis of the petition did offer the following observation:

Apart from the passage of additional time, Mr. Duncan's current petition adds nothing to his previous petitions, all of which the Bureau denied. The petition arguably does not satisfactorily address pertinent issues. It is, of course, Mr. Duncan's burden to provide evidence of rehabilitation. See *Flanzer, supra*, at 1398. In the absence of such evidence, it is difficult to conclude that Mr. Duncan has satisfied this burden.

LEGAL CONCLUSIONS

Burden/Standard of Proof

1. Government Code section 11522 provides, in pertinent part, the following:

A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition The agency itself shall decide the petition, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement.

2. Business and Professions Code section 7601.1 states:

Protection of the public shall be the highest priority for the Cemetery and Funeral Bureau in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

3. In a proceeding for the restoration of a revoked license, the burden at all times rests on the petitioner to prove that he has rehabilitated himself and is therefore entitled to have his licensed restored, and not on the Bureau to prove the contrary. (*Flanzer v. Board of Dental Examiners* (1990) 220 Cal. App. 3d 1392, 1398.) Petitioner must bear in mind that as an applicant for reinstatement he, "is not in the position of an untried newcomer, but a fallen licentiate." (*Ibid.*) "It is elementary that a person seeking restoration of a revoked license has no greater rights than a person seeking an original license." (*Housman v. Board of Medical*

Examiners (1948) 84 Cal. App. 2d 308, 312.) Moreover, it is reasonable, "that the person seeking reinstatement...should be required to present stronger proof of his rehabilitation." (*Housman, supra*, at p. 315.)

4. In seeking reinstatement, petitioner bears a heavy burden of proving rehabilitation. (*Hippard v. State Bar* (1989) 49 Cal. 3d 1084, 1091-1092.) Petitioner carries the burden to establish by clear and convincing evidence that he is entitled to the requested relief. (*Ibid*; *Flanzer v. Board of Dental Examiners, supra*, 220 Cal. App. 3d 1392, 1398.) "The amount of evidence of rehabilitation required to justify admission varies according to the seriousness of the misconduct at issue." (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1086 (dis. opn. of Lucas, C.J.)) The more serious the misconduct and the bad character evidence, the stronger the applicant's showing of rehabilitation must be. (*In re Menna* (1995) 11 Cal.4th 975, 987; see *In re Nevill* (1985) 39 Cal.3d 729, 735; *Roth v. State Bar* (1953) 40 Cal.2d 307, 313; *In re Gossage* (2000) 23 Cal.4th 1080, 1096.)

5a. Petitioner applied for reinstatement pursuant to Government Code section 11522. California Code of Regulations, Title 16, section 1253.5, subdivision (b) provides the following:

When considering a petition for reinstatement of a license under the provisions of Section 11522 of the Government Code, the bureau shall evaluate evidence of rehabilitation submitted by the petitioner considering those criteria specified in Section 1253 of this article.

5b. The criteria specified in Title 16, section 1253 are:

(a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(b) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the Business and Professions Code.

(c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

(d) The extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.

(e) Evidence, if any, of rehabilitation submitted by the applicant.

6a. Petitioner's convictions for sexual battery and lewd and lascivious acts with a child are extremely serious and troubling in that Petitioner targeted vulnerable youth for his so-called "experimentation." Equally troubling is the fact that Petitioner sought to recruit one of his victim's into joining a gang. (See Factual Finding 2.) Petitioner has never addressed this issue specifically in any of his petitions and does not appear to appreciate the gravity of his conduct.

Petitioner's unlawful and abhorrent acts are inimical to the qualifications, functions, and duties of a licensed funeral director and apprentice embalmer.

6b. In contrast, Petitioner has complied with the terms and conditions of his criminal probation, and has not committed any subsequent criminal acts that could serve as grounds for denial since the imposition of revocation of his funeral director and apprentice embalmer registration licenses on February 27, 2003. In addition, the record indicates that two of Petitioner's three convictions have been dismissed pursuant to Penal Code section 1203.4 on October 25, 2011. (See Factual Finding 6a.)

6c. The Director is mindful and acknowledges that Petitioner is making efforts and strides towards putting these most unpleasant episodes behind him. Petitioner's actions are to be commended. On the other hand, since persons under the direct supervision of judicial or correctional authorities must behave in exemplary fashion, little weight is generally placed on the fact that such an individual did not commit additional crimes or continue inappropriate behavior while under supervision. (*In re Gossage, supra*, at p. 1099.) Furthermore, "a dismissal under section 1203.4 ... is in no way equivalent to a finding of factual innocence ... [and] does not purport to render the conviction a legal nullity." (*Skulason v. California Bureau of Real Estate* (2017) 14 Cal. App. 5th 562, 568.) Rather, the statute, "simply authorizes a court to grant relief to individuals who successfully complete the terms of probation by mitigating some of the consequences of conviction." (*Ibid.*) While the Petitioner lays stress upon the fact that he has obtained two Orders of Dismissal pursuant to Penal Code section 1203.4, those orders in itself do not satisfy the burden resting on him. (*Housman, supra*, at p. 318.)

7a. Rehabilitation is not an event but rather a process. It is a concept that must be evaluated and assessed on multiple levels. The opportunity at a second chance has long and deep roots in our culture and the law. But, the opportunity at a second chance does not come automatically, simply earned with the passage of time. Rather, we must all earn our second chance. This is the core notion of rehabilitation.

7b. To that end, what is not attached to Petitioner's request for reinstatement is also significant. Specifically, Petitioner did not submit a personal statement with his petition demonstrating his changed behavior and reliability that would assist the Director in determining his rehabilitation. Similarly, Petitioner did not file written argument in support of his current petition before the Director. (See Factual Findings 8 and 9.) Instead, Petitioner elected to emphasize in this petition how burdensome and inconvenient the revocation of his licenses are to him. While Petitioner's revocation of his licenses may be burdensome to him, it is not evidence of rehabilitation.

8a. Throughout his four petitions for reinstatement, Petitioner has repeatedly characterized his completion of his criminal probation as proof of his rehabilitation. But again, little weight is placed on this. In addition, the impression given by Petitioner is that he views his completion of a mandatory sex offender therapy program as an assurance that he has gained the necessary insight to change his ways. (See Factual Findings 6a., 6b., and 7b.) However, Petitioner completed the program in 2006.

8b. Petitioner has presented no credible evidence with any of his four petitions to demonstrate that he has participated in any rehabilitative programs, or that he has undergone treatment or therapy since that time. (See Factual Findings 5c., 6c., and 7c.) Petitioner's serious misconduct lies at the heart of his functioning as a funeral director and apprentice embalmer, and Petitioner's assurances and the passage of time, alone, are not sufficient evidence that he is rehabilitated. In the current petition for reinstatement, Petitioner did not establish that he will not be a risk to the public if reinstated.

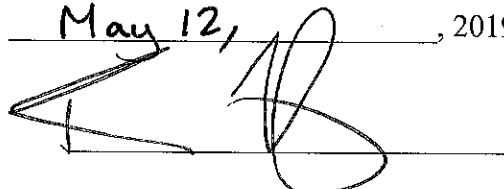
9. Accordingly, Petitioner has made progress. However, in light of the troubling acts he committed, Petitioner must present strong proof of rehabilitation to the Department and the Bureau. Thus, to obtain reinstatement of his licenses, Petitioner had the burden of establishing that he has been rehabilitated and that he does not pose a risk to the public interest, safety or welfare. On this record, he has not met that high standard. Therefore, cause exists to deny the petition.

ORDER

The Petition for Reinstatement of Funeral Director License Number FDR 1726 and Apprentice Embalmer Registration No. AE 12130, filed by Petitioner Deleno N. Duncan, is hereby **DENIED**.

This decision shall become effective on May 12, 2019.

DATED: April 12, 2019.

A handwritten signature in black ink, appearing to read 'Ryan Marcroft', is written over a horizontal line.

RYAN MARCROFT
Deputy Director, Legal Affairs Division
Department of Consumer Affairs